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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled case.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Ohio, Eastern District, entered on December 20, 1963, is not officially reported but is reprinted in the Appendix A hereto, p. 1a, *infra*. The opinion of the Court of Appeals for

the Sixth Circuit, entered on August 26, 1965, is reported at 349 F. 2d 601 and is reprinted in the Appendix B hereto, p. 4a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1965. A timely petition for rehearing was denied on November 9, 1965. On timely application, Mr. Justice Stewart on December 3, 1965, signed an order extending the time for filing this petition for writ of certiorari to and including January 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Do the registration provisions of the National Firearms Act, 26 U.S.C. § 5841, compel the registrant to admit a criminal violation of some other section of the Act, thereby abridging the privilege against self-incrimination as protected by the Fifth Amendment?

2. If § 5841 of the National Firearms Act be deemed invalid under the Self-Incrimination Clause of the Fifth Amendment, is § 5855 of the Act, which makes it unlawful for any person required to register a firearm under § 5841 to transport firearms in interstate commerce, so inseparably connected with § 5841 as to fall under the same constitutional proscription? Under these circumstances, is a criminal conviction for violating § 5855, or is conditioning continuance of an interstate business upon compliance with § 5841, consistent with the Due Process Clause of the Fifth Amendment?

3. Can a criminal conviction under § 5855 of a person, required to register firearms under § 5841, for having transported such firearms in interstate com-

merce be sustained in the absence of any evidence that he failed to comply with other provisions of the Act so as to make registration necessary under § 5841?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution; Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

National Firearms Act, Title 26, United States Code (1954):

> **§ 5841. Registration of persons in general**
>
> Every person possessing a firearm shall register with the Secretary or his delegate the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of buisness or employment, and if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation, or which such person made if, the provisions of this chapter applied to such transfer, importation or making, as the case may be, and if the provisions which applied thereto were complied with.

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* In the event that certiorari is granted, petitioner intends to present and argue the additional question whether a conviction under § 5855 can be sustained in the absence of any competent evidence that any of the unregistered weapons shipped in interstate commerce were in fact firearms within the meaning of § 5848 of the Act.

§ 5851. Possessing firearms illegally

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812 (b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

§ 5855. Unlawful transportation in interstate commerce

It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

STATEMENT

On March 22, 1961, petitioner was charged, in a one-count indictment, with having violated § 5855 of the National Firearms Act, 26 U.S.C. § 5855, by shipping in interstate commerce 52 firearms without his having registered them with the Secretary of the Treasury or his delegate as required by § 5841 of the Act, 26 U.S.C. § 5841.

Petitioner entered a plea of guilty on December 4, 1961, but on September 20, 1962, the District Court for the Northern District of Ohio permitted him to withdraw the guilty plea. He thereafter filed a motion

to dismiss the indictment on the grounds (1) that § 5841 was constitutionally invalid in that it violated his privilege against self-incriminaiton as protected by the Fifth Amendment, and (2) that § 5855, being premised upon the invalid § 5841, was void under the Due Process Clause of the Fifth Amendment. The motion to dismiss was denied on December 20, 1963, in a memorandum opinion by District Judge Kalbfleish. See Appendix hereto, p. 1a, *infra*.

The petitioner was then tried before a jury, District Judge Battiste presiding. The motion to dismiss the indictment on the above constitutional grounds was renewed and denied. Following the trial, petitioner was adjudged guilty, fined $2,000 and placed on probation for three years.

At the trial, the evidence showed that petitioner—a federally licensed dealer in weapons of all kinds—was in Oconomowoc, Wisconsin, on November 2, 1959, examining a stock of firearms in the warehouse of Datal Industries. Datal was a dealership owned by David Tallmadge, who was a federally licensed dealer and manufacturer of weapons. Petitioner thereupon entered into a contract with Tallmadge to remove, as agent for Tallmadge, all the guns, ammunition, accessories and parts in the warehouse and to sell them on a commission basis for Tallmadge. All such sales were to be made pursuant to the Internal Revenue Code.

Arrangements were then made by petitioner to have a trucking company ship the firearms by tractor trailer from the warehouse in Wisconsin to petitioner's place of business in Bogota, New Jersey. The entire contents of the building—allegedly including the 52 firearms re-

ferred to in the indictment—were loaded onto the tractor trailer, which left Oconomowoc on Saturday night, November 16, 1959.

When the tractor trailer arrived in Cleveland, Ohio, the driver was stopped by police because the truck appeared to be overloaded. The police asked for a bill of lading and when the driver replied that he had none the police asked to see the load. Upon seeing the load of guns and ammunition the driver was arrested and the truck was moved to a nearby Ravenna Arsenal, where the truck and its load were turned over to the Army. A supervisor of the Alcohol and Tobacco Tax Division of the Internal Revenue Service was called in to inspect and examine the truck and its load and to make an inventory of the contents. Two reports of the Treasury Department were received in evidence for the purpose of showing that 52 weapons, allegedly included in the shipment, had not been registered in accordance with § 5841.

At the conclusion of the Government's case, petitioner moved for a dismissal or for entry of a judgment of acquittal on the grounds that §§ 5841 and 5855 were unconstitutional and unenforceable and on the further grounds that the Government had failed to make a *prima facie* case in that it failed to prove (1) that petitioner had shipped weapons which were firearms within the purview of § 5848 of the Act,[1] and (2) that the petitioner was required to register said weapons in accordance with § 5841. Petitioner emphasized in this motion that the Government had failed to prove that any of the weapons shown

[1] This question, as indicated in the footnote to the Questions Presented herein, is reserved for further development and consideration in the event that certiorari is granted.

on the non-registration reports were among those shipped by the petitioner and that most of the weapons introduced at the trial were not shown to be firearms as defined by § 5848. The motion was denied.

At the conclusion of the trial, petitioner renewed the motion for a dismissal or for a judgment of acquittal; and upon the jury's verdict he moved for judgment *non obstante veredicto* on the same grounds. All of these motions were denied by the court.

The judgment of conviction was affirmed on appeal by the Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Conflicts With Decisions of Other Circuits as to the Constitutionality of the Registration Provisions of the National Firearms Act.

The decision below, holding that the registration provisions in § 5841 of the National Firearms Act do not invade the privilege against self-incrimination as protected by the Fifth Amendment, is in direct conflict with the decision of the Ninth Circuit in *Russell* v. *United States,* 306 F. 2d 402, and with the decision of the Seventh Circuit in *Dugan* v. *United States,* 341 F. 2d 85. The decision below is also inconsistent with the holdings of various District Courts that have passed upon this issue: *McCann* v. *United States,* 217 F. Supp. 751 (D. Colo.); *United States* v. *Mares,* 208 F. Supp. 550 (D. Colo.), aff'd on other grounds, 319 F. 2d 71 (C.A. 10); *United States* v. *Fleish,* 227 F. Supp. 967 (E. D. Mich.).

The statutory pattern makes plain the constitutional issue which has divided the Circuits. Section 5841 requires every person possessing a firearm to register

with the Secretary of the Treasury or his delegate the identifying number or mark of the firearm, the name and address of the person, the place where the firearm is kept, and the person's place of business or employment. The second sentence of § 5841 provides, however, that such registration is not required if (1) the person acquired the firearm by transfer or importation, or if he made the firearm, and if (2) there was compliance with the provisions of the Act relating to the transfer, importation or making of firearms.[2]

It follows that any person who registers a firearm pursuant to § 5841 does so only because he possesses a firearm which he acquired or made without complying with the provisions of the Act relating to the transfer, importation or making of firearms. Those provisions are seven in number.[3] Failure to comply with any of those seven provisions is made unlawful by § 5851, subjecting the person to the criminal penalties of § 5861—i.e., a fine of not more than $2,000, or imprisonment for not more than 5 years, or both.

This is the statutory scheme which led the Ninth Circuit in the *Russell* case, 306 F. 2d 402 at 409, to

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[2] The court below, in quoting § 5841 in footnote 1 of its opinion, omits the second sentence of the section, which is critical in any understanding of the conditions under which registration is required.

[3] The seven provisions are: (1) § 5811, requiring payment of a tax upon the transfer of a firearm; (2) § 5812(b), relating to exemptions of certain transfers upon the making of certain disclosures and proof; (3) § 5813, requiring the affixing of stamps to show payment of the transfer tax imposed by § 5811; (4) § 5814, relating to the requirements for a transfer of a firearm; (5) § 5821, imposing a tax on and requiring a disclosure of the making of a firearm; (6) § 5844, relating to the exportation of firearms; and (7) § 5846, relating to the administration and enforcement of taxes and assessments.

declare that "Section 5841 therefore compels every person in possession of a firearm, as defined in the Act, to be a witness against himself concerning compliance with statutes for violation of which there is a heavy penalty . . . . Russell could make no report under section 5841 without admitting an actual or presumptive violation of law." Section 5841 was accordingly held to be unconstitutional as abridging Russell's Fifth Amendment privilege against self-incrimination.[4]

Similarly, the Seventh Circuit in the *Dugan* case, 341 F. 2d 85 at 86, concluded that the language of § 5841 "indicates to us that only when an individual is in possession of a firearm which has been made, transferred or imported in violation of the Act is he required to register . . . . It is apparent that registration is required under § 5841 only where another section of the Act has not been complied with. Registration would be an admission that another section or other sections of the Act had been violated and might support a conviction by a court. We agree with the contention of petitioner that the registration requirement of § 5841 violates the privilege against self-incrimination established by the fifth amendment to the United States constitution." And the Seventh Circuit expressed itself as in complete agreement with the *Russell* decision of the Ninth Circuit. 341 F. 2d at 87.

Moreover, the *Russell* decision has not only been followed by federal district courts in Colorado and Michi-

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[4] Subsequently, in *Harris* v. *United States*, 338 F. 2d 75, 80, the Ninth Circuit referred to its *Russell* decision in these terms: "Russell involved the constitutionality of the compulsory registration provisions of Title 26 U.S.C. § 5841, a firearms law. Since the mere act of registration compelled incrimination this court held the statute unconstitutional."

gan[5] but has been relied upon by the Court of Appeals for the District of Columbia Circuit in *Communist Party of United States* v. *United States,* 331 F. 2d 807, 813, holding that officers of the Communist Party could, in reliance on their Fifth Amendment privilege, refuse to register under the Subversive Activities Control Act and that no liability attached to the Party by reason of their refusal. See also *Albertson* v. *Subversive Activities Control Board,* 382 U.S. — (decided Nov. 15, 1965).

The Sixth Circuit's decision in this case, however, is diametrically opposed to the rulings in the *Russell* and *Dugan* cases. Despite petitioner's repeated contention that the reasoning of those cases was dispositive of the issue, the Sixth Circuit declined to follow those rulings and held that § 5841 did not violate the provisions of the Fifth Amendment relating to the privilege against self-incrimination. In so holding, the Sixth Circuit sought to dilute the impact of the *Russell* decision in three respects:

(1) In disregard of the fundamental premise of the *Russell* decision that registration under § 5841 admits violation of one or more other sections of the Act for which there is a criminal penalty, the Sixth Circuit seized upon and differed with that portion of the *Russell* opinion dealing with the presumption clause in the second sentence of § 5851. The *Russell* opinion had noted, 306 F. 2d at 409, 411, that this sentence of § 5851 makes possession of a firearm acquired by anyone at any time in violation of any of the seven specified sec-

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[5] As previously indicated, these decisions are *McCann* v. *United States,* 217 F. Supp. 751 (D. Colo.); *United States* v. *Mares,* 208 F. Supp. 550 (D. Colo.), aff'd on other grounds, 319 F. 2d 71 (C.A.10); and *United States* v. *Fleish,* 227 F. Supp. 967 (E.D. Mich.).

tions of the Act "sufficient evidence to authorize conviction unless the defendant explains such possession to the satisfaction of the jury." Thus, said *Russell*, the mere act of registration under § 5841 would also establish presumptive or prima facie evidence of the violation of law revealed by the registration.

The court below, however, said that "We do not so read Section 5851" and that the Government would have to show something more than mere possession—such as a transfer in violation of a specified section—in order to obtain a conviction under § 5851.[6] Compare *United States* v. *Gainey*, 380 U.S. 63, and *United States* v. *Romano*, 382 U.S. — (decided Nov. 22, 1965). Whatever the merits of the Sixth Circuit's reading of § 5851, that reading does not meet or answer the *Russell* analysis of § 5841 whereby registration *ipso facto* concedes a criminal violation of some other section of the Act. The basic conflict as to the validity of § 5841 remains unaltered by the Sixth Circuit's discussion of § 5851. And the conceded difference in interpretation of § 5851 only heightens the conflict between Circuits and the appropriateness of review by this Court.

(2) The Sixth Circuit sought to distinguish *Russell* by reference to the Ninth Circuit's later decisions in *Frye* v. *United States*, 315 F. 2d 491, *cert. denied*, 375 U.S. 849, and in *Starks* v. *United States*, 316 F. 2d 45.[7]

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[6] Yet in this case, upon a charge of violating § 5855 and failing to register under § 5841, there was a complete absence of evidence that there had been a transfer in violation of any other provision of the Act so as to require registration under the Act. See pp. 21-23, *infra*.

[7] Reference was also made to the Eighth Circuit's decision in *Sipes* v. *United States*, 321 F. 2d 174, *cert. denied*, 375 U.S. 913, which agreed with and followed the Ninth Circuit's decisions in *Frye* and *Starks*.

In *Frye* and *Starks*, the Ninth Circuit held that the *Russell* constitutional rationale was confined to situations where the defendant himself had been charged with failing to register firearms under § 5841 and hence would be entitled to question the impact of § 5841 on his own privilege against incrimination. As was stated in *Starks*, 316 F. 2d at 46, with reference to the defendants in both the *Frye* and the *Starks* cases:

> ". . . the defendant was not charged with failing to register the weapon, as was the defendant Russell, but was charged with possession of an unregistered weapon [under § 5851]. Section 5841, considered in *Russell*, makes it an offense to fail to register, and we held in *Russell* that to that extent, it is invalid. It is the possession of a gun that no one has registered, not the failure by appellant to register, that is the essence of the offense [under § 5851] with which appellant was charged in this case. Appellant did not have to accept or acquire possession of the gun, and when he did so, that gun not having been registered by any one, the offense was complete."

In those circumstances and without retreating from its *Russell* decision as to the invalidity of the registration provisions of § 5841, the Ninth Circuit concluded that § 5851 as applied in *Frye* and *Starks* was not inconsistent with the Fifth Amendment privilege against self-incrimination.

The Sixth Circuit sought to apply the *Frye-Starks* rule to the charge in the instant case. Defining the gist of a § 5855 offense as "the unlawful shipment of unregistered firearms in interstate commerce," the Sixth Circuit read § 5855 as though it made immaterial the defendant's own failure to register under § 5841

and as though it made unlawful the shipment of guns that no one had registered.

But the very language of § 5855 refutes the Sixth Circuit's analysis and its attempt so to discard the *Russell* principle. Section 5855 makes it unlawful to transport firearms in interstate commerce only when the transportation is by "any person who is required to register as provided in section 5841 and who shall not have so registered."[8] Thus the interstate transportation is unlawful under § 5855 only if the defendant himself has failed to register the firearms under § 5841; unlike the situation as to possession in violation of § 5851, it is not enough under § 5855 that someone else may have failed to register the weapons. And since the defendant's own failure to register under § 5841 is the express and basic premise of a § 5855 violation, the validity of the registration requirement is necessarily brought into issue. On that issue the *Russell* decision is inescapably pertinent. Indeed, the carefully delineated remarks in the *Frye* and *Starks* opinions distinguishing the *Russell* case compel the conclusion that the Ninth Circuit, confronted with the instant charge that petitioner transported weapons that he failed to register as required by § 5841, would deem its *Russell* rationale controlling. The failure of the Sixth Circuit to recognize that the validity of the registration requirements of § 5841 is necessarily in issue in this

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[8] In addition, the indictment here alleged that petitioner unlawfully shipped in interstate commerce certain firearms "without having registered the said firearms with the Secretary of the Treasury or his delegate, as required by Section 5841," in violation of § 5855. Judge Kalbfleisch's memorandum opinion before trial (see Appendix A hereto, p. 2a, *infra*) noted that "defendant's guilt, if it be ascertained, could only, under the facts as charged, be premised upon his failure to register pursuant to Section 5841."

§ 5855 prosecution and to apply the *Russell* reasoning to the instant case further augments the conflict between the two Circuits.

(3) Finally, the Sixth Circuit attempted to avoid the Ninth Circuit's *Russell* ruling and the Seventh Circuit's *Dugan* ruling by stating that petitioner's registration of firearms under § 5841 would not have required him to admit criminality. Citing *United States* v. *Sullivan*, 274 U.S. 259,[9] the Sixth Circuit said that petitioner could have claimed his privilege on the registration form as to particular questions, the answers to which he believed might tend to incriminate him, but that petitioner was not excused from filing the form itself.

But the Ninth Circuit in *Russell* anticipated the Sixth Circuit's discussion on this point and expressly distinguished the *Sullivan* decision of this Court. The *Russell* opinion pointed out that, whereas Sullivan could have complied with the income tax law by filing a return and claiming his privilege only as to questions that would bring out the illegal source of the income, Russell "could make no report under section 5841 without admitting an actual or presumptive violation of law." The distinction, in other words, was precisely the one drawn recently by this Court in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. . . . (decided Nov. 15, 1965), where it was noted that response

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[9] In *Sullivan*, this Court held that the Fifth Amendment does not excuse one from making a return of his net income, although all or most of the gross income may be derived from an illegal business. The Court said that if the return called for answers that the defendant believed he was privileged from making he could raise the objection in the return, but could not on that account refuse to make any return at all.

to any of the questions in the registration form there involved—as is true here—might involve the registrants in the admission of a crucial element of a crime.

This conflict as to whether registration under § 5841 would actually concede some criminality only underscores the broader underlying conflict as to the constitutional validity of § 5841. Nothing that the Sixth Circuit here said renders the *Russell* decision inapposite. Only this Court can resolve so fundamental a difference over the constitutionality of § 5841.

2. The Decision Below Raises Important Constitutional and Statutory Questions and Creates Confusion and Inequity in the Administration of the National Firearms Act.

By its reading and application of the relevant sections of the National Firearms Act, the Sixth Circuit not only has rendered an opinion conflicting with the rulings of the Ninth and Seventh Circuits but has created new, confusing and important problems in the administration of the Act. Those problems stem from constitutional and statutory considerations of such magnitude as to warrant full review by this Court of the judgment below. The problems are quickly stated:

(1) Is the gist of a criminal offense under § 5855 the mere act of shipping unregistered firearms in interstate commerce, as the court below ruled? Or does § 5855 mean what it says—that it is unlawful for "any person who is required to register as provided in section 5841 and who shall not have so registered" to ship any firearm in interstate commerce? And if the latter reading be adopted, does not the gist of a § 5855 offense become twofold: (a) a failure by the defendant to register certain firearms under § 5841, and (b) a shipment of those firearms in interstate commerce by that

defendant?[10] The unwarranted construction by the court below would eliminate § 5855's express requirement that the shipper himself was required to register under § 5841 and failed to do so.

(2) If a failure to register firearms pursuant to § 5841 is part of the offense specified in § 5855, is it not necessary that the registration provisions of § 5841 be fully examined and that the Government supply proof that the defendant was required to register under those provisions? Since that is true, the second sentence of § 5841 becomes critical, the sentence that provides that registration is required only if certain other provisions of the Act have not been complied with. And a problem is then raised by the opinion below as to the degree of proof of such non-compliance required by § 5851, which imposes criminal sanctions for non-compliance. Does mere possession suffice to establish a *prima facie* case of non-compliance, or is something more required?

The ultimate question raised as to § 5841, of course, is whether registration thereunder necessarily admits some criminal violation and, if so, whether it is constitutionally valid in light of the Fifth Amendment's protection of the privilege against self-incrimination. The nature and substantiality of that question have been fully demonstrated by the Ninth Circuit's *Russell*

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[10] As already indicated, the indictment charged petitioner with having violated § 5855 by transporting certain firearms "without having registered the said firearms . . . as required by Section 5841." Moreover, the trial court charged the jury that the essential elements of the charged offense were (1) the possession by the defendant of the firearms in question, (2) a requirement that the defendant register all or any of the firearms, (3) the failure of the defendant to register all or any one of those firearms, and (4) the shipment by the defendant of all or any of those firearms in interstate commerce.

decision and the Seventh Circuit's *Dugan* ruling. While neither of those cases involved a prosecution under § 5855, the interstate transportation provision, the express incorporation of § 5841 into that provision makes the *Russell* and *Dugan* views as to § 5841 fully relevant in this case.

Moreover, the constitutional question as to § 5841 is neither answered nor drained of its significance by the speculation of the court below that criminality might not have attached here if petitioner had registered prior to the start of the interstate shipment, or that he might have cancelled the arrangement upon discovering that incrimination might ensue from registration. As the Seventh Circuit said in *Dugan*, 341 F. 2d at 87, "we do not think that the fact that there might be cases where registration would not result in incrimination by the registrant is any answer to the contention that one who is required to register might thereby incriminate himself."

(3) If it be concluded, as the *Russell* and *Dugan* opinions concluded, that the registration provisions of § 5841 are constitutionally invalid, is § 5855 sufficiently separate and distinct from § 5841 to preclude a similar constitutional fate? Does not § 5855's express incorporation of the § 5841 registration requirements make § 5855 totally dependent upon the validity of those requirements?[11] Particularly in the absence of any sep-

[11] Compare § 5851, which outlaws the possession of firearms that have been illegally transferred or that have not been registered as required by § 5841. To the extent that § 5851 has been applied without charging the defendant himself with having failed to register under § 5841, this section has been held separable from § 5841 and hence not subject to the constitutional infirmities of § 5841. *Sipes* v. *United States*, 321 F. 2d 174, 178 (C.A.8); *Starks* v. *United States*, 316 F. 2d 45, 46 (C.A.9).

arability provision in the National Firearms Act, can it be said that Congress would have have intended to outlaw interstate shipments of firearms by a licensed interstate dealer who has failed to register those firearms and whose obligation to register could not constitutionally be compelled?

These questions clearly bring into pertinence the settled rule that "if a statute is in part unconstitutional, the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intention of the legislature." *International Text-Book Co.* v. *Pigg,* 217 U.S. 91, 113; and see *Berea College* v. *Kentucky,* 211 U.S. 45; *Allen* v. *Louisiana,* 103 U.S. 80; *Loeb* v. *Trustees of Columbia Township,* 179 U.S. 472. Were the rule otherwise, or if it were not applied in the instant context, serious questions under the Due Process Clause of the Fifth Amendment would be raised by a conviction under a section of a statute so completely dependent upon another and unconstitutional section.

The need for definitive resolution of these various statutory and constitutional questions is manifest. The varying answers supplied by the Circuits has created confusion and uncertainty in the administration of the National Firearms Act. From the Government's point of view, the statute must be applied with an uneven hand, registration of firearms being required in the Sixth Circuit but not in the Ninth and Seventh Circuits. As shown by its vigorous arguments in the court below, the Government does not accept the *Russell* decision as to the constitutional invalidity of § 5841 and has claimed that the Ninth Circuit there made "an

erroneous decision that has caused serious difficulty in enforcing the National Firearms Act.'"[12]

From the standpoint of licensed arms dealers like the petitioner who engage in interstate shipments, the situation is such that four confusing possibilities are open: (1) if they operate within the Ninth or Seventh Circuits they can probably decline to register on the strength of the *Russell* and *Dugan* decisions; (2) in the Sixth Circuit, however, dealers must register in light of the decision below and run the risk that their registration might incriminate them; (3) if the Sixth Circuit is correct in holding that a conviction under § 5855 can be sustained despite the incorporation of the invalid registration requirements, then *Russell* and *Dugan* cannot be safely relied upon in any Circuit, since failure to register will then support a conviction under § 5855 for making an interstate shipment despite the unchanged risk of self-incrimination arising from the registration requirements; (4) if firearm dealers operate in a Circuit that has not passed upon the validity of the registration provisions they run the serious risk of being prosecuted for a failure to register, for ship-

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[12] Brief for the United States, p. 5, in the court below. The Government there asserted that the Ninth Circuit had not been provided with sufficient information as to the history, operation and application of § 5841 and that its *Russell* opinion was predicated on two erroneous assumptions: (1) that any registration under § 5841 constitutes an admission of criminal acts under § 5851, and (2) that the presumption provided by § 5851 attaches the element of guilt to the possession admitted by the registration of a firearm. The Government accordingly urged (Brief, p. 21), with success, that the Sixth Circuit not follow the *Russell* decision and that it reject petitioner's claim that § 5841 is unconstitutional.

The Government's brief below was filed prior to the Seventh Circuit's opinion in *Dugan*, 341 F. 2d 85, with which the Government presumably disagrees in similar fashion.

ping firearms which they failed to register, or for a crime revealed by registration itself. In short, the interstate firearms business, as conducted by legitimate and licensed dealers, is in a chaotic and uncertain status.[13]

The National Firearms Act has been held by this Court to be a proper exercise of the Government's taxing authority, *Sonzinsky* v. *United States,* 300 U.S. 506, and it has been utilized as a weapon against organized crime. However, there is a significant and legitimate concern by gun collectors and licensed dealers—a concern shared by the Government—that the conflicting views of the Circuits has created confusion and un-

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[13] That the concern of legitimate licensed gun dealers is a real and significant one is illustrated by the position of the petitioner in this business, a position that is seriously jeopardized by the confusion now existing.

Petitioner supplies major defense contractors, such as Lockheed Aircraft Company, the Boeing Corporation, the Breeze Corporation, and Aircraft Armament Company, with cannons and machine guns to be used in testing components used in military equipment. Petitioner was apparently the only United States source available to supply the Magnatron Corporation with Russian mortars to be used in developing, for the Defense Department for use in Viet Nam, sensing devices to locate mortars surreptitiously moved into an area by guerrilla forces. Petitioner supplies research institutes, such as the Massachusetts Institute of Technology, with cannons and cannon barrels for classified projects. He is a principal supplier of military museums and has supplied machine guns and cannons to West Point, the Smithsonian Institute, The Marine Corps Museum, United States Artillery Museum, and various private museums in the United States. He supplied surplus firearms for use in the filming of "PT 109" and "For Whom the Bell Tolls." Additionally, seventeen New Jersey police departments have responded to petitioner's offer to supply to any New Jersey Police Department sub-machine guns without charge and with a qualified instructor. All of these activities are thrown into jeopardy by the decision below.

certainty in the administration of the Act. Only the grant of certiorari and the resolution of these important and recurring problems of constitutional magnitude can restore an equitable administration to the Act.

3. The Decision Below Raises an Important and Substantial Question as to the Proof Necessary To Establish the Necessity of Registration Under § 5841.

Underlying the brief statement of the court below that "the evidence was sufficient to support the judgment of conviction" is a serious and significant question as to the nature and degree of proof necessary to establish the necessity of registration pursuant to § 5841. That question is intimately related to the constitutional and statutory issues here involved.

The statutory provision, § 5855, under which petitioner was tried and convicted becomes applicable by its own terms only to a "person who is required to register as provided in section 5841 and who shall not have so registered." The indictment, the memorandum opinion of the District Court and the charge to the jury all stressed this factor, this necessity of proof that petitioner failed in his duty to register the firearms pursuant to § 5841. As has been indicated, the duty to register under § 5841 depends upon non-compliance with one or more other provisions of the Act, provisions which carry criminal sanctions by virtue of § 5851. Hence it would appear incumbent upon the Government to produce sufficient proof of non-compliance with at least one of these other provisions in order to establish the duty to register under § 5841.

In fact, the court below (Appendix B, p. 7a, *infra*) and the Government's brief in that court (pp. 18-19) conceded that to establish a violation of § 5851—the section penalizing the failure to comply with the seven

other provisions of the Act[14]—the Government must prove possession of a firearm that is not in compliance with any of the enumerated provisions listed in § 5851. See *Waters* v. *United States,* 328 F. 2d 739, 742 (C.A. 10); *Taylor* v. *United States,* 333 F. 2d 721, 722 (C.A. 10). Since the failure to comply with any of those seven other provisions is also the basis of the obligation to register under § 5841, proof of such failure becomes essential to the establishment of the duty to register.

But the record is completely barren of any such proof. To this day petitioner does not know which provision of the Act he failed to comply with so as to give rise to his duty to register. In the court below, the Government contented itself with a quotation from and reliance upon the *Frye* opinion of the Ninth Circuit, 315 F. 2d at 493, to the effect that it is sufficient that the Government give affirmative proof, by a certificate of non-registration, that the guns in question were not registered under § 5841. And see *Starks* v. *United States,* 316 F. 2d 45, 46 (C.A. 9). Such a certificate was, of course, produced by the Government in this case.

But proof of non-registration was sufficient in *Frye* and *Starks* simply because in those cases the charge under § 5851 was that the defendant had in his possession firearms which had never been registered by anyone; there was no charge whatever that the defendant

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[14] Section 5851 also provides criminal sanctions for possessing a firearm "which has not been registered as required by section 5841." This provision, which may have led the court below to conclude that mere non-registration is sufficient to establish a case against petitioner, does not pretend to establish what proof is necessary to establish a duty to register under § 5841. Obviously, the duty to register is not shown by the mere fact of non-registration.

himself was obliged to register the guns and that he failed to comply with that obligation. In the instant case, however, where an integral part of the charged offense is a duty on the defendant himself to register, mere proof of non-registration is insufficient to establish the duty of the defendant to register.

Thus, even assuming the constitutional validity of the registration provisions of § 5841, there has been a total failure to establish this most vital element of the alleged offense—the duty to register the weapons shipped in interstate commerce. So complete is this evidentiary void as to warrant outright reversal of the judgment of conviction.[15] See *Thompson* v. *City of Louisville,* 362 U.S. 199; *Garner* v. *Louisiana,* 368 U.S. 157; *Shuttlesworth* v. *City of Birmingham,* 382 U.S. ... (decided Nov. 15, 1965).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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December 29, 1965.

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[15] The other evidentiary problem as to the deficient proof that any of the weapons in question were firearms within the meaning of the Act has been reserved by the petitioner for further discussion in the event certiorari is granted. That problem is not presented herein as a reason for granting review.

APPENDIX A

Memorandum of District Court for the Northern District of Ohio, Eastern Division, on Motion To Dismiss Indictment.

(Filed December 20, 1963)

Criminal No. 23652

UNITED STATES OF AMERICA

v.

VALMORE J. FORGETT, JR.

KALBFLEISCH, J.

Defendant was indicted on March 22, 1961, for violating Section 5855 of Title 26, U. S. C. A. On December 4, 1961, he entered a plea of guilty. On September 20, 1962, Judge McNance of this Court, who had accepted his plea of guilty and who had imposed sentence, permitted defendant to withdraw his guilty plea and ordered the sentence vacated and set aside. Thereafter defendant filed a motion to dismiss the indictment on the basis that the section under which he was charged violated his rights against self-incrimination under the Fifth Amendment of the United States Constitution.

Section 5855 provides that it is unlawful for anyone who is required to register a firearm pursuant to Section 5841 of Title 26, U. S. C. A., and who has not so registered, to ship, carry or deliver any firearm in interstate commerce. That section is a prohibition against certain classes of persons' engaging in interstate firearms shipments; that is, it forbids any persons who possesses any firearm in violation of Section 5841 from engaging in interstate shipments of any type of firearm, and it makes no difference whether the firearms which are to be shipped are registered or unregistered.

Section 5841 requires that all persons possessing firearms shall register them, and then excepts from registra-

tion certain firearms which have been previously properly registered.

Section 5851 of Title 26, U.S.C.A., provides that it is unlawful for anyone to possess a firearm which is required to be registered pursuant to Section 5841 if it has not been so registered.

The Ninth Circuit Court of Appeals held in *Russell* v. *United States,* 306 F. 2d 402, that Section 5841 unconstitutionally required a person to incriminate himself because when it was combined with Section 5851 it required that every person who was guilty of possessing a firearm in violation of Section 5851 must come forward and identify himself by registering that firearm. The *Russell* case was followed explicitly by the District Court of Colorado in *McCann* v. *United States,* 217 F. Supp. 751 (1963), and implicitly in *United States* v. *Mares,* 208 F. Supp. 550 (1962), affirmed by the Tenth Circuit at 319 F. 2d 71 (1963).

Defendant herein contends that a conviction under Section 5855 would likewise be in violation of his Fifth Amendment rights because he is charged with engaging in interstate commerce in firearms at a time when he possessed unregistered firearms. It should be noted that Section 5855 also precludes from participating in interstate commerce in firearms such persons as are in violation of certain other sections of the National Firearms Act. However, defendant's guilt, if it be ascertained, could only, under the facts as charged, be premised upon his failure to register pursuant to Section 5841.

The same Court which decided the *Russell* case subsequently held that the unconstitutionality of Section 5841 did not preclude a conviction under Section 5851, although the forbidden action charged under Section 5851 was the possession of a firearm which had not been registered as required by Section 5841. *Frye* v. *United States,* 315 F. 2d 491 (1963), certiorari denied 375 U. S. 849. Judge Hamley,

who wrote the *Russell* opinion, was a member of the Court which decided the *Frye* case. The Ninth Circuit reiterated the identical view in *Starke* v. *United States,* 316 F. 2d 45 (1963). The same conclusion was reached by the District Court of California in *Hazelwood* v. *United States,* 208 F. Supp. 622 (1962). The reasoning of these later cases distinguishes the *Russell* case by saying that the charge under Section 5851 was the possession of an unregistered firearm, not the failure to register, and therefore that the unconstitutionality of Section 5841 does not preclude the use of Section 5841 as a basis for a 5851 conviction. This same view was apparently approved in *Sipes* v. *United States,* 321 F. 2d 174 (8th Cir., 1963), certiorari denied 375 U. S. 913.

It therefore follows that, assuming that Section 5841 is unconstitutional, as the opinions in the *Frye, Starke* and *Sipe* cases did, if Section 5841 may nevertheless be used as a basis for a Section 5851 conviction there appears to be no reason why it may not be used as the basis for a Section 5855 conviction.

The defendant's motion to dismiss the indictment will be denied, with leave, however, for defendant to reassert the motion at the time of trial.

/s/ GIRARD E. KALBFLEISCH
United States District Judge

APPENDIX B

No. 16021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

VALMORE J. FORGETT, JR., *Defendant-Appellant.*

On Appeal From the District Court of the United States for the Northern District of Ohio, Eastern Division.

Decided August 26, 1965.

Before: WEICK, Chief Judge, MILLER, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

WEICK, Chief Judge. Appellant Forgett was indicted for unlawfully shipping in interstate commerce fifty-two firearms without having them registered with the Secretary of the Treasury or his delegate, as required by Section 5841[1] of Title 26, U.S.C., in violation of Section 5855[2]. He entered a plea of guilty to the charge. Thereafter he was granted leave to withdraw his plea of guilty, and filed a motion to dismiss the indictment on the ground that Section 5841 was unconstitutional, in violation of his rights

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[1] Sec. 5841, Title 26, U.S.C., provides:

"Every person possessing a firearm shall register with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof . . ."

[2] Sec. 5855, Title 26, U.S.C. provides:

"It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce."

against self incrimination under the Fifth Amendment to the Constitution. The motion to dismiss was denied by the District Court in a memorandum opinion. Forgett was then tried and convicted by a jury. He was fined $2,000. and placed on probation for three years.

Forgett was a licensed dealer in firearms. He made arrangements with a trucking company to ship the firearms by tractor-trailer from Oconomowoc, Wisconsin, (where he had purchased them about two weeks previously from another licensed dealer), to Jersey City, New Jersey. No bill of lading was issued for the shipment. There were fifty or more automatic weapons of different makes and types, including foreign machine guns, machine pistols, American automatic weapons such as 50-calibre machine guns and a quad 50 anti-aircraft automatic weapon.

The tractor-trailer was loaded with weapons and left Oconomowoc for Cleveland on a Saturday evening. Upon arrival in Cleveland the truck driver was stopped by police because the tractor-trailer outfit was overloaded. The police asked to see the load because the driver had no bill of lading. When the police discovered the weapons, they arrested the truck driver and had the tractor-trailer moved to the Ravenna arsenal. A supervisor with the Alcohol and Tobacco Tax Division of the Internal Revenue Service who had over twenty-one years' experience in enforcing the National Firearms Act, went to the Arsenal to inspect and examine the firearms. He made an inventory of the weapons which included their make, calibre and serial numbers. The list was then typed and sent to the Treasury Department in Washington for a registration check. That Department issued its Certificate to the effect that the weapons had not been registered. The Certificate was received in evidence.

A member of the Ohio National Guard test filed about thirty-six of the automatic weapons. He reported that four Browning 50 calibre machine guns, which had not

been registered, were in operating condition. He also reported on several other firearms in operating condition and as to some which required the addition of a part.

The principal point raised by Forgett in his appeal was that Section 5841 violated the Fifth Amendment to the Constitution by compelling every person possessing a firearm, as defined by Title 26, Section 5848, to give evidence against himself admitting violation of one or more sections of Chapter 53, for which there is a criminal penalty. He relied heavily on *Russell* v. *United States*, 306 F.2d 402 (C.A. 9, 1962).

The constitutionality of the National Firearms Act as a taxing measure was upheld by the Supreme Court in *Sonzinsky* v. *United States*, 300 U.S. 506 (1937). Later the Act was held not to be in violation of the Second Amendment to the Constitution in *United States* v. *Miller*, 307 U.S. 174 (1939). See also *United States* v. *Decker*, 292 F. 2d 89 (C.A. 6, 1961).

Although there was some confusion in *Russell* as to the nature of the offense charged in the information, the Court determined that the offense was failure to register the firearms, in violation of Section 5841. The Court reasoned that the act of registration was self-incriminating because under the presumption clause contained in the second sentence of Section 5851[3], proof of possession establishes *prima facie* a violation of that Section. *Id.* 411.

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[3] Sec. 5851, Title 26, U.S.C. provides:

"It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

We do not so read Section 5851. The second sentence referred to specifically states ". . . possession of such firearm". This refers to a firearm transferred in violation of any of the six sections mentioned in the first sentence, or to a firearm which has not been registered as required by Section 5841.

In order to obtain a conviction for violation of Section 5851, the Government would be required to show something more than mere possession of the firearms. The statutory presumption alone would not be sufficient to make out a *prima facie* case. It would be necessary to prove that the firearms had been transferred in violation of one or more of the enumerated sections, or had not been registered. *Waters* v. *United States,* 328 F.2d 739 (C.A. 10, 1964); *Sipes* v. *United States,* 321 F.2d 174 (C.A. 8, 1963).

A similar presumption clause was considered by the Supreme Court in the recent case of *United States* v. *Gainey,* 380 U.S. 63 (1965), and was held not to deprive the trial judge of his normal powers with respect to submitting the case to the jury or granting a judgment notwithstanding the verdict. The presumption provided by the statute was merely a rule of evidence and was not conclusive. It did not prevent the jury from being properly instructed on the standard for reasonable doubt.

The Ninth Circuit subsequently distinguished *Russell* in *Frye* v. *United States,* 315 F. 2d 491 (C.A. 9, 1963) cert. denied 375 U.S. 491 and *Starks* v. *United States,* 316 F.2d 45 (C.A. 9, 1963), on the ground that *Russell* involved only a charge of failure to register firearms in violation of Section 5841, whereas in *Frye* and *Starks* the offense was possession of an unregistered firearm in violation of Section 5851. *Frye* and *Starks* were followed by the Eighth Circuit in *Sipes* v. *United States,* 321 F. 2d 174 (C.A. 8, 1963).

In the case at bar the gist of the offense was the unlawful shipment of unregistered firearms in interstate commerce. Forgett's failure to register the firearms would not have authorized conviction under Section 5855, if he had not made the shipment in interstate commerce. The reasoning in *Frye, Starks* and *Sipes* justifying the convictions for possession of unregistered firearms, applies with equal force here to a Section 5855 violation.

Nor do we understand that registration of the firearms by Forgett would have required him to admit criminality. Between the dates of purchase and shipment Forgett could have registered the firearms and the interstate shipment would then have been lawful. If it developed in connection with the registration that criminality might attach upon completion of his purchase this would have furnished him with adequate ground for not going through with the deal. If the registration form contained questions, the answers to which he believed might tend to incriminate him, he could claim his privilege on the registration form. Cf. *United States* v. *Sullivan*, 274 U.S. 259 (1927).

In our opinion the evidence was sufficient to support the judgment of conviction.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16,021

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

VALMORE J. FORGETT, JR., *Defendant-Appellant.*

Before: WEICK, Chief Judge, MILLER, Circuit Judge, and McALLISTER, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

CARL W. REUSS
Clerk

Filed Aug 26 1965 Carl W. Reuss, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A) is unreported. The opinion of the court of appeals (Pet. App. B) is reported at 349 F. 2d 601.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1965. A petition for rehearing was denied on November 9, 1965. On December 3, 1965, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 8, 1966, and the petition was filed on December 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

206-483—66

QUESTIONS PRESENTED

1. Whether Section 5855 of the Internal Revenue Code prohibiting the interstate shipment of unregistered firearms is constitutional.

2. Whether the evidence was sufficient to sustain the conviction.

STATUTE INVOLVED

National Firearms Act, 26 U.S.C.:

§ 5841 Registration of Persons in General

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

§ 5855 Unlawful Transporation in Interstate Commerce

It shall be unlawful for any person who is required to register as provided in Section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of Ohio, petitioner was convicted of interstate transportation of unregistered firearms in violation of 26 U.S.C. 5855 and was fined $2,000 and placed on probation for three years (D.A. 62a).[1] Petitioner's pre-trial motions to dismiss the indictment on the ground that prosecution under Section 5855 was unconstitutional (D.A. 2a) were dismissed by the district court (D.A. 3a–5a, 8a–9a; Pet. App. 1a–3a). On appeal, the conviction was affirmed (Pet. App. 4a–8a).

The evidence showed that petitioner, a licensed dealer in firearms, purchased a stock of weapons from another licensed dealer in Wisconsin and arranged for its shipment to New Jersey, approximately two weeks later, by truck (G.A. 5b–6b, 32b). The truck carrying petitioner's firearms was stopped by Ohio police for being overweight (G.A. 11b–13b). After the driver was unable to produce a bill of lading, the cargo was inspected, and a list of all the weapons was sent to the Treasury Department for a registration check (D.A. 58a–61a; G.A. 14b–18b; Ex. 2–B). The check revealed that 53 of the firearms were not registered pursuant to any provision of the National Firearms Act (D.A. 51a–55a; Ex. 2–A, G.A. 25b–26b).

[1] "D.A." refers to the appendix to the Brief for Defendant-Appellant and "G.A." to the appendix to the government's brief filed in the court below.

ARGUMENT

The sole basis for petitioner's contention (Pet. 7–15) that his prosecution for *unlawful interstate transportation* of firearms under 26 U.S.C. 5855 was unconstitutional is the fact that prosecutions for *failure to register* under 26 U.S.C. 5841 have been held to violate the privilege against self-incrimination. *Russell* v. *United States*, 306 F. 2d 402 (C.A. 9); *Dugan* v. *United States*, 341 F. 2d 85 (C.A. 7). Assuming, *arguendo*, that these decisions are correct,[2] the court below properly held that they do not support petitioner's contention. There is no conflict among the circuits on this issue. Indeed, the decision below is in accord with those of all the circuits—including the Ninth—which have passed on basically the same contention as petitioner's in the analogous case of prosecutions under 26 U.S.C. 5851. There is, therefore, no occasion for further review.

The *Russell* and *Dugan* cases were limited to the direct enforcement of criminal sanctions for failure to register under Section 5841. Reading that section as requiring persons "to provide information as to past conduct (or present status) which was actually

[2] *Russell* and *Dugan* were both predicated on the erroneous assumption that registration under Section 5841 *necessarily* constitutes admission of illegal possession under Section 5851 (306 F. 2d at 408, 411; 341 F. 2d at 86), although the Seventh Circuit appeared at one point to recognize that there were cases in which registration under Section 5841 would not be self-incriminatory (see 341 F. 2d at 87). See *United States* v. *Sullivan*, 274 U.S. 259. In any event, the question of direct prosecutions under Section 5841—involved in *Russell* and *Dugan*—is of no continuing importance, since such prosecutions are no longer being brought by the government.

or presumptively unlawful" (306 F. 2d at 410), the courts held that a person could not constitutionally be prosecuted for failing to provide such information. Subsequent to *Russell*, the Ninth Circuit held that its decision in that case did not preclude convictions under 26 U.S.C. 5851 for *unlawful possession* of unregistered firearms since, in such a case, the defendant is not prosecuted for his failure to provide information. *Frye* v. *United States*, 315 F. 2d 491, 494, certiorari denied, 375 U.S. 849; *Starks* v. *United States*, 316 F. 2d 45, 46.[3] See to the same effect *Taylor* v. *United States*, 333 F. 2d 721, 722 (C.A. 10); *Sipes* v. *United States*, 321 F. 2d 174, 178 (C.A. 8), certiorari denied, 375 U.S. 913. *Castellano* v. *United States*, 350 F. 2d 852 (C.A. 10), petition for a writ of certiorari pending, No. 863 Misc., this term. The rationale of these cases is that, although the government cannot punish a person for failure to incriminate himself under Section 5841, it may prohibit a person from receiving or possessing a gun for which he does not have proper documentation. In effect, the statute has been interpreted to hold the possessor of a gun to a requirement that its title be on record with the Treasury Department. In such a prosecution, the government must affirmatively show both possession of the gun and lack of proper documentation.

[3] Contrary to petitioner (Pet. 12-13), *Frye* and *Starks* are not distinguishable from the present case on the ground that Section 5851, but not Section 5855, might involve only the failure to register under Section 5841 by someone other than the defendant. No such line was drawn in either of these cases. In fact, every person possessing a firearm is required to register under Section 5841 unless he or someone else who was re-

As the court below held, the same rationale applies to this case. The gist of the offense is shipping unregistered guns in interstate commerce. Petitioner was not, and could not be, prosecuted under Section 5855 for failure to register or for refusing to incriminate himself. The statute did not force him into either accepting or transporting firearms. He could have refused to purchase them, registered the transaction himself at the time of purchase without risk of self-incrimination,[4] or refrained from shipping them interstate. Petitioner, a substantial dealer in firearms (Pet. 20, n. 13) undoubtedly familiar with the federal documentation requirements, made the threshhold decision to ship unregistered arms in interstate commerce, and it was for this conduct alone that he was prosecuted.

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quired to register the gun under some other provisions of the Act has already done so. Thus, the defendants in *Frye* and *Starks*, no less than petitioner, were covered by the registration provision of Section 5841.

[4] The tax imposed by Section 5811 on the transfer of firearms is payable by the transferor and is evidenced by stamps affixed to an order form. Transactions between licensed dealers, as were involved here, are not taxed under Section 5811, however, and no order form, but merely recordation of the transaction, is required. 26 U.S.C. 5814(c), 26 C.F.R. 179.151. The information which petitioner was required to record with the Treasury Department at the time he received the firearms in question is essentially the same as that required of persons falling within the registration provision of Section 5841. Thus, petitioner's filing of the required data, if done at the time of transfer and before he shipped the arms interstate, would not have constituted an admission of any illegal conduct on his part, but rather would have validated, under the Act, his acquisition and subsequent interstate shipment of the firearms. Cf. *Mares v. United States*, 319 F. 2d 71, 73 (C.A. 10).

2. The argument that the government failed to prove that petitioner was required to register before he shipped the guns interstate (Pet. 21–23) is without merit. Under Section 5841 any transferee of a firearm, as defined in the Act,[5] is required to register unless the firearm had already been registered and the transfer properly reported in accordance with other provisions of the Act (see n. 4, *supra*). Hence, the certificate introduced by the government that the firearms in question had never been registered under *any* section of the Act necessarily proved that petitioner was required to register the guns before he shipped them interstate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
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BEATRICE ROSENBERG,
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Attorneys.

FEBRUARY 1966.

[5] The contention (which petitioner reserves but does not argue) that the guns in question do not fall within the definition of "firearm" in Section 5848 is without merit. Presumably this argument will be based on the fact that some of the guns were not operative without the addition of a part. Aside from the fact that we do not believe this removes the guns from the purview of the Act, there was testimony that a number of the weapons were actually in full operative condition at the time of shipment (G.A. 26b–30b).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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February 23, 1966.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY BRIEF

The Government's Brief in Opposition is premised on a reading of § 5855 of the National Firearms Act that (1) is belied by the plain words of the statute, and (2) is contrary to the theory of the indictment, the prosecution and the conviction of this petitioner. Indeed, so gross is the difference between the argument now advanced by the Government and the basis of the conviction as to raise a serious due process question. As was held in *Cole* v. *Arkansas,* 333 U.S. 196, 202, petitioner is entitled, as a matter of due process, to have the validity of his conviction "appraised on con-

sideration of the case as it was tried and as the issues were determined in the trial court." The Government would now deny him that right.

At the trial court level, petitioner was charged in the indictment with having violated § 5855 in that he shipped in interstate commerce some 52 firearms "without having registered the said firearms with the Secretary of the Treasury or his delegate as required by Section 5841." D.A.1. This indictment thus reflected that portion of § 5855 which makes it a crime "for any person who is required to register as provided in section 5841 and who shall not have so registered" to transport any firearm in interstate commerce.[1] The quoted words of that section clearly contemplate that the defendant himself be the one who was obligated to register under § 5841 and who failed in that obligation. By that language the necessity—and therefore the constitutionality—of registration under § 5841 is necessarily brought into issue in a transportation prosecution under § 5855.

That issue was both recognized and resolved in the trial court. District Judge Kalbfleisch's pretrial memorandum (see Pet., p. 2a), holding § 5855 to be constitutional despite its incorporation of § 5841's registration provisions, noted that "defendant's guilt, if it be ascertained, could only, under the facts as charged, be premised upon his failure to register pursuant to Section 5841." And District Judge Battisti, in charg-

[1] Section 5855 also makes it unlawful for "any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821" to ship or deliver any firearm in interstate commerce. But that portion of § 5855 is not here involved. Petitioner was not charged with having failed to possess a § 5814 order or a § 5821 declaration. He was charged with having failed to register under § 5841, as required.

ing the jury, stated that one of "the essential elements of the offense charged in this indictment" which had to be proved "beyond a reasonable doubt" was that "the defendant was required to register all or any of these firearms." G.A. 36b.

Thus this petitioner stands convicted solely on the ground that he transported firearms that he himself was required to register under § 5841, a ground which is dictated by the language used in § 5855. But the Government would now change the theory of the statute as well as of this conviction. It would recast both the statute and the conviction so as to make the gist of the offense the mere act of "shipping unregistered guns in interstate commerce" (Opp., p. 6)—i.e., guns which no one ever registered. It would read out of § 5855 and out of this conviction any need for proving what Congress has so plainly required—the obligation of the defendant himself to register under § 5841 the firearms which were transported in interstate commerce. At every portion of its brief, the Government discreetly attempts to assume away this very vital statutory requirement.

Only by omitting this plain requirement of § 5855 can it be said, as the Government urges (Opp., p. 5), that this case is analogous to such cases as *Frye* v. *United States,* 315 F. 2d 491 (C.A. 9), and *Starks* v. *United States,* 316 F. 2d 45 (C.A. 9), involving prosecutions under § 5851 for unlawful possession of unregistered firearms. Under § 5851, as the *Starks* opinion noted (316 F. 2d at 46), "It is the possession of a gun that no one has registered, not the failure by appellant to register, that is the essence of the offense." To prove a § 5851 violation, therefore, it is unnecessary to show any obligation on the defendant to perfect a registration under § 5841; hence the con-

stitutionality of the registration provision cannot come into issue.

But where, as under § 5855, the defendant is the one required to register and the failure so to register is an essential predicate of a violation of the interstate transportation provision, the necessity and the constitutionality of such registration are necessarily brought into focus. It is on that basis that the conflict between the decision below and those rendered by the Ninth Circuit in *Russell* v. *United States,* 306 F. 2d 402, and by the Seventh Circuit in *Dugan* v. *United States,* 341 F. 2d 85, becomes plain. And it is on that basis that the necessity of proof by the Government that the petitioner himself was obligated to register under § 5841 becomes obvious. It is not enough, as the Government claims (Opp., p. 7), that the firearms in question had never been registered under *any* section of the Act. Unless there is proof that the petitioner himself, rather than someone else, was obligated to register, there has been no violation of § 5855—applicable by its express terms only to "any person who is required to register as provided in section 5841"[2]

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[2] The Government's argument (Opp., p. 7) that under § 5841 any transferee of a firearm is required to register unless the firearm has already been registered, and that proof of non-registration therefore proves that petitioner was required to register before shipping the firearms interstate, is specious. According to the Government (Opp., p. 6, n. 4), petitioner, as a transferee, would have been "required to record with the Treasury Department [under § 5814(c)] at the time he received the firearms in question . . . essentially the same [information] as that required of persons falling within the registration provision of Section 5841." But there was no proof of that requirement and hence no basis for the jury to conclude under § 5855 that petitioner was "required to register as provided in section 5841."

Nor can it be said, as the Government would have it (Opp., p. 4), that the *Russell* and *Dugan* decisions merely held that *prosecutions* for failure to register under § 5841 violate the privilege against self-incrimination. Those decisions held that § 5841 was in and of itself unconstitutional by virtue of the Fifth Amendment. See *Harris* v. *United States,* 338 F. 2d 75, 80, where the Ninth Circuit referred to its *Russell* decision in these terms: "Since the mere act of registration compelled incrimination this court held the statute unconstitutional." And, where, as here, an interstate transportation prosecution is premised upon a failure to comply with such an unconstitutional provision, the conflict and the confusion become compounded.

Finally, the assertion of the Government (Opp., p. 4, n. 2) that non-registration prosecutions under § 5841 "are no longer being brought by the government" in no way detracts from the existence of the live conflict between circuits over the constitutionality of the registration requirement or from the important questions thereby presented. Refusal to enforce a criminal law does not bear upon its continuing validity or invalidity; nor does it preclude the possibility, made a reality in this case, of unfair enforcement against an innocent party as part of a transportation prosecution. See *District of Columbia* v. *Thompson Co.,* 346 U.S. 100, 117. The issues raised in the petition accordingly remain ripe and appropriate for resolution.

CONCLUSION

The attempt by the Government to rewrite § 5855 and to alter the basis of the conviction below cannot disguise the conflict concerning the constitutionality of the registration provisions of the National Fire-

arms Act. The importance of that question and the resultant confusion in the administration of the Act fully warrant the exercise of this Court's certiorari jurisdiction. And the confusion compounded by the Government in its re-interpretation of § 5855 only adds to the need for an authoritative analysis of that section by this Court.[3]

Respectfully submitted,

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[3] No attempt has been made herein to correct the various factual misstatements in the Government's brief. For example, the petitioner did not purchase the weapons from the dealer in Wisconsin (cf. Opp., p. 3); petitioner received the weapons under a contract wherein he was to sell them as the agent of the dealer. Nor is it at all clear that "a list of all the weapons was sent to the Treasury Department for a registration check" (cf. Opp., p. 3); the inventory prepared by the examining agent was not retained and there was no evidence connecting the inventory list with the list sent to Washington. Moreover, there was no evidence that "a number of the weapons were actually in full operative condition at the time of shipment" (cf. Opp., p. 7, n. 5); only one gun that had been test fired was introduced into evidence but it was not operative. A weapon, to be a "firearm" within the meaning of the Act, must be operative at the time of the alleged offense. *United States* v. *Thompson*, 202 F. Supp. 503 (N.D. Cal.); *United States* v. *Cokin*, Cr. No. 268-64 (D.N.J.), decided Sept. 28, 1965.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on February 28, 1966, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. The Grant of Certiorari in Costello v. United States, No. 826, Oct. Term, 1965.

On March 21, 1966, following the denial of certiorari in the instant case, this Court granted certiorari in *Costello* v. *United States,* No. 826, Oct. Term, 1965, limited to the question whether "the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment" and whether this Court, "especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,*" 382 U.S. 70, should overrule *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419. Substantially the same question is posed and pending before this Court in the following petitions for writs of certiorari filed in October Term 1965: No. 823, *Marchetti* v. *United States;* No. 848, *Markis* v. *United States;* No. 849, *Piccioli* v. *United States;* No. 902, *Millo* v. *United States;* No. 906, *Grassia* v. *United States;* and No. 951, *Moretti* v. *United States.*

While the instant case involves the constitutionality of the registration provisions (§ 5841 as incorporated by § 5855) of the National Firearms Act, much of the same considerations are involved as will be before this Court in *Costello* when it reconsiders the validity of the federal wagering tax registration requirements. In the earlier decision now to be reconsidered, *United States* v. *Kahriger,* 345 U.S. 22, 25, 32, this Court in part premised the validity of the wagering tax registration requirements by referring to *Sonzinsky* v. *United States,* 300 U.S. 506, 513, where the basic validity of the National Firearms Act was sustained as a revenue measure. And *Kahriger* also placed heavy reliance on *United States* v. *Sullivan,* 274 U.S. 259, the

income tax return filing case which played a significant role in the analysis of the court below affirming the validity of the firearm registration requirements.

Indeed, the whole tenor of the matters to be reviewed in *Costello* bears a striking resemblance to the considerations necessarily involved in the instant case. Does the person registering under the wagering tax provisions, like the person registering a firearm, thereby admit a violation of law? Does the fact that the wagering tax laws, like the National Firearms Act, are revenue-producing measures excuse or justify the seeming invasion of Fifth Amendment rights? Can such compelled disclosures of criminal violations be permitted in light of more recent decisions of this Court under the Fifth Amendment, such as the *Albertson* decision?

The close identity of issues in this case and in the *Costello* case—and in the six related pending petitions—amply justifies a reconsideration of the denial of certiorari here. In fact, it would be quite appropriate for this Court to hear and consider the instant case at the time it hears and considers the *Costello* case, thereby exploring a wider range of federal registration requirements. That appropriateness is underscored, moreover, by the confusion created under the National Firearms Act by the conflicting circuit views as to the constitutionality of the registration requirements. See *Russell* v. *United States,* 306 F. 2d 402 (C.A. 9), and *Dugan* v. *United States,* 341 F. 2d 85 (C.A. 7), holding those requirements invalid under the Fifth Amendment. And much of what has been said and held with respect to firearms registration is most relevant to the dialogue that will occur before this Court in *Costello.*

For these various reasons, therefore, the denial of certiorari should be reconsidered to the end that this case be heard and resolved simultaneously with the *Costello* case.

2. The Violation of the Principles of Cole v. Arkansas, 333 U.S. 196.

Petitioner clearly was entitled, as a matter of due process, to have the validity of his conviction appraised by the Court of Appeals "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas,* 333 U.S. 196, 202. But that principle was egregiously violated by the court below; and this error—which is of constitutional proportions—was repeated and amplified in the Government's Brief in Opposition before this Court.

The affirmance below was premised on the theory that "the gist of the offense was the unlawful shipment of unregistered firearms in interstate commerce," Pet. App. 8a, without regard to any duty on the petitioner himself to effectuate registration. The same concept as to the "gist of the offense" is repeated by the Solicitor General at page 6 of the Brief in Opposition. But petitioner was never indicted, tried or convicted on that theory.

Rather he was charged and tried for the offense of shipping firearms "without having registered the said firearms with the Secretary of the Treasury or his delegate as required by Section 5841." D.A. 1. The pre-trial opinion of Judge Kalbfleish, in recognition of this language in the indictment, ruled that petitioner's guilt, "if it be ascertained, could only under the facts as charged be premised upon *his failure to register pur-*

suant to Section 5841." Pet. App. 2a; emphasis added. And Judge Battisti charged the jury that one of the essential elements of the crime, which had to be proved by the Government, was that "the defendant was required to register all or any of these firearms." G.A. 366.

Yet the most careful examination and analysis of the record shows not a scintilla of evidence, of any kind or description, either direct or circumstantial, that the petitioner was in fact required to register in accordance with § 5841—as the indictment had charged. But the Court of Appeals completely ignored that fatal flaw in the evidence. And it did so by propounding a new version of a § 5855 offense, one with which petitioner had never been charged and for which he had never been tried. The gist of the offense suddenly and dramatically shifted from one of transporting firearms which the defendant himself was required to register to one of transporting firearms which no one had ever registered. By that sleight of judicial hand, it became irrelevant under the court's theory that there was no evidence that petitioner himself had a duty to register the firearms under § 5841. Thus petitioner's conviction was sustained on a new theory of law which removed the burden on the Government, as recognized by the trial court, to produce evidence of petitioner's duty to register and which rubber stamped the sufficiency of the other evidence which was adduced.

Petitioner was thereby deprived of his right to have his conviction reviewed on the basis of the theory of the indictment, the pre-trial opinion, and the charge to the jury. Contrariwise, petitioner has been denied any right to a trial on the new theory advanced by the

Court of Appeals and repeated before this Court by the Solicitor General. This combination of circumstances is so grossly violative of the principles of *Cole* v. *Arkansas, supra,* as to call for a re-evaluation of the denial of certiorari and to permit petitioner's conviction to be appraised on the basis of the charges actually made against him.

3. The Complete Lack of Evidence as to the Transportation of "Firearms" as Defined in the Act.

The Petition for Writ of Certiorari, p. 3, reserved the right to "argue the additional question whether a conviction under § 5855 can be sustained in the absence of any competent evidence that any of the unregistered weapons shipped in interstate commerce were in fact firearms within the meaning of § 5848 of the Act." Such evidence was so completely absent as to call for the exercise of this Court's supervisory power over the administration of criminal justice in the federal courts and for the reversal of the judgment below.

Not every type of weapon shipped in interstate commerce comes under the spread of the National Firearms Act. The only weapons regulated and controlled by the Act are those defined to be "firearms" by § 5848(1). Recognizing this fact, the indictment charged petitioner with shipping weapons in interstate commerce which "were firearms within the purview of § 5848." That section defines a firearm as follows:

> "A shotgun having a barrel or barrels of less than eighteen inches in length, or a rifle having a barrel or barrels of less than sixteen inches in length or any weapon made from a rifle or shotgun . . . if such weapon as modified has an over-

> all length of less than twenty-six inches or any other weapon, except a pistol or revolver from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun. . . ."

The Government, of course, has the burden in a criminal case to prove every essential element of the crime charged, every fact and circumstance essential to the guilt of the accused. *Grunewald* v. *United States,* 353 U.S. 391. To support the conviction in the instant case, the Government was therefore required to prove that the petitioner shipped weapons in interstate commerce and that those weapons were within the statutory definition of firearms.

In *United States* v. *Anderson,* Criminal No. 15951 in the District Court for the District of Columbia, the court ruled that

> "The gun . . . must be capable of using the energy of explosive in the fixed shotgun shell to fire through a smooth bore . . . which necessarily implies that there must be some mechanism to bring about the firing of a shotgun shell to make a firearm or a shotgun within the definition of the statute. . . . Where the alleged weapon is so defective because of some mechanical defect in its structure that it cannot be fired . . . it does not come within the definition of a firearm."

In *United States* v. *Thompson,* 202 F. Supp. 503 (N.D. Cal.), the court held that the

> ". . . determination of what is and what is not a 'firearm' depends in great part upon whether the particular object in question will or will not propel a shot through explosive energy."

In that case the court held that a shotgun without a firing pin is not a firearm within the jurisdiction of the National Firearms Act.

Now in the recent case of *United States* v. *Kokin,* (D.N.J., Crim. No. 268-64), the court on stipulated facts found that there was no sale of a "firearm" within the meaning of the Act where a gun dealer sold an M1 Carbine, which is a semi-automatic rifle, together with a complete set of M2 Carbine parts, which when installed in the M1 Carbine would make a fully automatic machine gun, and the dealer also furnished an Army Field Manual describing the steps necessary to convert the M1 Carbine and the M2 parts into a fully operable M2 machine gun. The court said "The violation—if consummated at all—must have resulted from the simultaneous mailing of the M1 Carbine and the M1 stock plus the enumerated M2 Carbine parts."

Assuming that these various elements could be readily employed in the construction of a M2 Carbine rifle, the court in *Kokin* could not find the presence of such a weapon in the sale itself. In the court's words, "this is not to say that such transactions may not defeat the spirit of the firearms legislation. The particular activity, however, is not proscribed by the letter of that Act . . . If the transaction here discussed be determined dangerous or otherwise within the regulatory intent of the National Firearms Act, the proper remedy rests in proper legislative amendment. This Court cannot on these facts conclude . . . sale to be a transfer of M2 Carbine rifle. *To do so would violate the most basic concepts of due process.*" [Emphasis added.]

Thus it appears from all of the cases which have considered this question that in order for a weapon

to be considered a "firearm" under the Act, it must be an operable weapon capable of discharging a shell. To be a machine gun within the definition, the mechanism must be complete and operable with all the parts necessary to discharge automatically by an explosive charge, more than one shot without manual reloading by a single function of the trigger. The burden of proof rests with the Government.

In the instant case none of the weapons introduced in evidence were shown to come within that definition. Agent Holmes, the Supervisor of the Alcohol & Tobacco Tax Division of the Internal Revenue Service who allegedly inventoried the weapons which form the basis for the instant indictment and conviction, responded as follows to a short series of questions on cross-examination:

> "Q. Can you tell us whether in 1959 when you looked at these weapons they were operable machine guns?
> A. No, sir, I can't tell you that.
> Q. You don't know?
> A. No, sir, I do not know."

An examination of the evidence offered by the Government, viewed in the most favorable light to the Government, reveals no testimony whatsoever that any of the weapons introduced in evidence and testified to were capable *at the time of seizure* of discharging a shot by an explosive and there was no evidence as to barrel length, overall length, or automatic capabilities. Only seven weapons were marked in evidence, which weapons were identified as follows: Exhibit 5 identified by Mark C. Holmes, a Supervisor of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, as a German Schmeisser machine pistol, serial No.

10954; Exhibit 6 identified by Mr. Holmes as a United States carbine M-2 with Serial No. 6917574; Exhibit 7 identified as a German M-P44 machine pistol 44, Serial No. 3860; Exhibit 8 identified as a Czech gun with a name Brno, Serial No. 6507; Exhibit 9 was identified as a Russian machine gun, Serial No. 505; Exhibit 10 was identified as a German light machine gun, Serial No. 5378; Exhibit 11 was identified as a United States Browning machine gun, 50 calibre, Serial No. 852045.

The Government introduced the testimony of Warren Danison, a sergeant in the Ohio National Guard, who testified that he test fired weapons bearing the following serial numbers: 1290513, 747199, 1 W 2735, 271940, 500066, 1806344, 548506, 1360774, 1428422, 1867905, 524269, 720786, 852045, 7189, 0078, 42923.

Note that only one of the weapons which were testified to by Sergeant Danison was introduced in evidence by the Government. There is no evidence in the record to show that any of the guns which were test fired by Sergeant Danison were previously in the possession of the petitioner or were taken from the truck in question. The one weapon introduced by Holmes, which was test fired by Danison, was admittedly not an operable weapon when seized. That weapon had no back plate or trigger housing. It was basically a barrel and barrel receiver without any capability of shooting either single shot or automatically. The petitioner objected to the admissibility of Sergeant Danison's testimony on the ground that it was irrelevant and immaterial—which objection was overruled. As may be seen from the foregoing, the only evidence before the jury was as follows:

1. Seven weapons were seized at the Ravenna Arsenal.

2. Fifteen weapons, 14 of which were different from the seven shown to have been examined by Mr. Holmes, were test fired by Seargeant Danison. The other weapon was inoperable when seized.

As a matter of law, neither a judge nor jury could properly draw a conclusion from the evidence so introduced that petitioner had shipped "firearms" within the purview of § 5848.

In view of the foregoing, the petitioner prays that the Court, in protection of petitioner's constitutional rights, exercise its general supervisory power to review the record and to reverse the judgment below on the grounds that there was insufficient evidence to support a conviction of having shipped "firearms" within the meaning of the Act.

CONCLUSION

On March 22, 1961, petitioner was indicted under § 5855 of the National Firearms Act for shipping weapons in interstate commerce, which were firearms as defined by the Act, without *his* having registered them as required by the Act.

Since that time uncountable man hours have been devoted to this case by attorneys for the petitioner, attorneys for the Government, and numerous judges and justices of the federal bench at all levels. After five years of litigation the law with respect to the interpretation of the National Firearms Act has moved from a posture of doubtful ambiguity to a state of utter confusion. The only clear and certain fact that emerges from all of these proceedings is that this petitioner has been convicted and that his conviction

has been affirmed on a theory wholly different from that on which he was tried. He has been convicted of a felony for violation of a statute which, although characterized as a taxing statute, is in fact an intricately devised collection of controls upon certain aspects of organized crime and racketeering.

And yet the petitioner is neither a felon nor a racketeer nor a cog in the wheel of organized crime. He is and has been since a very early age a devoted collector of weapons of all kinds and is now at age 35 a leading authority on weaponry and its history. His company, among other things, produces for sale fine replicas of black powder and ball, muzzle loading, civil war rifles and pistols. He is a devoted husband and father, a civic-minded respected member of his community who served honorably in the United States Army and who has continued to serve his Government's agencies with his expertise whenever called upon. His business provides employment for others, adds to the economy and provides a source of fine collectors' items for other weapons enthusiasts and historians. He has contributed unstintingly of his time to the Smithsonian Institution, the Marine Corps Museum, the West Point Museum and other national historical institutions and has contributed numerous weapons of historical significance to these institutions, including a gift to the Marine Corps Museum of the first Maxim machine gun which was hand made by its inventor.

The advice "Go west, young man" might well have been heeded by this petitioner, for if, after his truck was loaded with weapons in Oconomawoc, Wisconsin, it had proceeded in a westerly direction into the Ninth or Seventh Circuits, it is clear that the petitioner

would not be a convicted felon today; for those Circuits have held the registration provision of the National Firearms Act unconstitutional and therefore no one can be convicted in those Circuits for the crime of shipping firearms which he failed to register. Unfortunately for this petitioner, his truck turned east into the sphere of influence of the Sixth Circuit, which Circuit has ignored or distinguished the decisions of the Ninth and Seventh Circuits and has propounded its own interpretation of the National Firearms Act—an interpretation inconsistent with that of the other Circuits and even divorced from the law propounded by the trial courts within its own Circuit.

There is thus no uniform law of the land today with respect to the registration and shipment of firearms in interstate commerce. Unless this Court clarifies the law, whether an arms dealer or collector is an honest man or a criminal remains completely dependent upon the Circuit in which he resides or conducts his business. Every step now taken by a licensed firearms dealer or collector under the present status of the law is taken at his peril, for he cannot know what his obligations and limitations are. In fact if this Court would but examine this law it would find that there is no way a person can confidently take possession of any firearm, for possession of a firearm which has *at any time* been illegally transferred is a crime, and there are no procedures for ascertaining whether or not any given weapon is an "illegal" firearm.

The complexity and difficulty of the law is demonstrated by the fact that two full days of oral argument on the constitutional questions urged by the petitioner were required before the trial court felt that it had a sufficient grasp of the interaction of the various

statutes to deal with the issues. Judge Battisti, although then noting his disagreement with the decision of Judge Kalbfleish, on a previous motion by the petitioner to dismiss the indictment, that the statutes were enforceable, ruled that Judge Kalbfleish's decision would nevertheless be the law of the case. Included in the decision of Judge Kalbfleish was an analysis of the essential elements of the offense, including the burden on the Government to prove petitioner's duty to register under § 5841. Normally a defendant must rely in preparing his defense upon his own understanding of the law but the petitioner presented his defenses in this case with Judge Kalbfleish's decision in his hand, relying upon the judge's statement of the Government's burden of proof and of the required elements of the offense. When the Government failed to meet that burden and failed to prove the essential elements, petitioner moved for an acquittal. When his motion was denied, he appealed, at which time and for the first time the Court of Appeals announced that there was no such burden upon the Government.

In addition, petitioner has argued at every stage of the proceedings that the Government was required to show that the weapons which were shipped were operable firearms. The record is devoid of any such showing; and yet, neither of the courts below has recognized the insufficiency of this aspect of the case. As a convicted felon convicted for what District Court Judge McNamee said was an "administrative error", this petitioner is denied by the operation of the Magnussen Act the privilege of continuing to operate the business he had established after fifteen years of long hours and hard labor, which deprivation is based upon a conviction founded on statutes which defy consistent

interpretation, have been applied ambiguously and inconsistently and which conviction has been sustained on facts so lacking in sufficiency as to demand this Court's review.

Petitioner recognizes that the firearms business is unpopular. It may often encompass the worst elements of our community and the complexity of the laws which regulate that business may not not warrant this Court's attention; but this petitioner, who has been deprived of his property without due process and who has been found guilty of violation of a law held unconstitutional in two federal circuits, warrants this Court's attention. For the foregoing reasons and for the reasons set forth in the original petition, petitioner prays that this Court will reconsider his application for issuance of a writ of certiorari.

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March 25, 1966

CERTIFICATE OF COUNSEL.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

CHARLES J. IRWIN